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DEC 9 1946

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In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

REPLY BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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Despite the assurance of Seatrain's counsel to the Commission that "the first and really the major issue which is before you here, namely, whether a certificate once issued confers rights which are not thereafter revocable" (R. 374), and the statement of same counsel at the first hearing that Seatrain would not introduce any evidence because, if it did, the decision "would have to be one confirming the original order, and since that is so, it might be that you would decide on the evidence rather than the question of law, and we want to have the question of law squarely

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decided" (R. 332), much of Seatrain's brief in this Court is taken up with arguments as to the scope of the operations in which Seatrain can engage under the amended certificate. Under this Court's decision in *United States* v. *Hancock Truck Lines,* 324 U. S. 774, we think that the question of statutory authority for the Commission to alter the terms of an earlier erroneously issued certificate is the only question open.

None the less, there are a number of statements in appellee's brief which imperatively require correction, and it is those statements which have primarily moved us to file the present reply brief.

I. SEATRAIN NEVER HANDLED COMMODITIES GENERALLY EXCEPT SUCH AS WERE CARRIED IN RAILROAD CARS

Appellee states (Br. 4) that "Seatrain presented unchallenged proof from shippers of the need of additional steamship service out of Texas City and between Texas ports and the North Atlantic ports, and referred the Commission to evidence before it on the matter in another proceeding." As Seatrain did not introduce any evidence at two hearings called by the Commission for that purpose, the "proof from shippers" must be the letters and telegrams to the Maritime Commission (R. 293–323) protesting against discontinuing service by the two Seatrain vessels at Texas City, as that would leave the industries and shippers without necessary water service, "particularly the

types of vessel which does not require breaking bulk" (R. 293). Other shippers wrote they had been using Seatrain for "carload shipments" of cranberries (R. 293–294); for "one or two carloads on every sailing into Texas" (R. 296); another would require space for 15 to 30 carloads per trip to transport potash salts (R. 305); another directed attention to the fact that the vessels could handle 100 tank or box cars up and down the coast (R. 309), and another advised it had shipped "four cars carbon black per week regularly north-bound." (R. 310.) Crude rubber was heavily relied upon as a commodity handled "in any manner except in railroad cars" (Appellee's Br. 19). Yet we find Firestone Tire & Rubber Co., Akron, Ohio, advising the Maritime Commission that it had been "large users of Seatrain services in the handling of crude rubber between New York and the Gulf" and the Seatrain method of handling without breaking bulk had been of particular value to it (R. 311). Seatrain concedes (Br. 20) that this rubber was handled in railroad cars. The value of being able to handle other shipments without breaking bulk was constantly referred to in letters from other shippers. (R. 313; R. 314; R. 318; R. 319; R. 320; R. 321.)

Appellee sets forth (Br. 6–7) large commitments allegedly made in reliance on the original certificate. The record references given in support of these assertions all go to the testimony of Seatrain's president, Brush, introduced *de*

novo over appellants' objection in the District Court. Of course, none of such evidence was sought to be presented to the Commission at two hearings called for the purpose, and the Commission quite properly found that the record contains no specific showing in that respect. (R. 37.) The Brush affidavit (R. 76), prepared two days before the first hearing (R. 77), is far too general to support any claim of expenditures or commitments in reliance on the original certificate.

Seatrain admits (Br. 8) that it "appeared specially without offering evidence." At page 10 of its brief, Seatrain again refers to the fact that it introduced no evidence, but (p. 11) says that as the Seatrain is subject to the Commission's jurisdiction, the Commission "could have ordered Seatrain to submit additional data." It seems clear that Seatrain had adequate opportunity to present evidence to the Commission, and did not avail itself of the chance; in fact, its counsel frankly admitted at the argument before the Commission that "we have not presented proof, which we had an opportunity to do, I would say." (R. 391.)

Appellee refers (Br. 9, 15) to "bridge" traffic it claims as the only traffic it can handle under the corrected certificate, and refers to the testimony of witness Brush introduced in court in support of its claim that this constitutes "only 25% of the total" traffic. On cross-examination Mr. Brush admitted that practically all its

Hoboken-New Orleans traffic in the past was in cars (R. 189); and that in its Texas City service, based on 10 months actual operation, the traffic handled in other than cars "was not substantial for the ten-month period." (R. 190.)

In setting out the wording of the amended certificate, Seatrain (Br. 9) omits the words "between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico." (R. 22.) The Commission was here defining the rights of a water carrier, and was not concerned with the inland transportation of commodities. This Court has already held (see U. S. Br. 34) that Seatrain's type of service "cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports." Seatrain admits (Br. 17) that "in the past Seatrain's traffic has been handled primarily in railroad cars but not always" and the record references given in support of "not always" is to "pressure vessels" so large that the railroads would not transport them. The right to transport "commodities generally" can hardly be supported by reference to this one commodity. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481. The question goes to the weight of the evidence to be accorded by the Commission, not a matter for the court.

Appellee admits (Br. 15) it could handle bridge traffic under the new certificate; its port-to-in-

terior traffic and interior-to-port traffic (Br. 15) and its port-to-port traffic (Br. 16) which it claims it cannot handle under the amended certificate because not received from and delivered to railroads, is all traffic which we submit it can handle if loaded in railroad freight cars, and there are terminal railways at the three ports Seatrain serves, Hoboken, Belle Chasse and Texas City, to which traffic is delivered and from which it is received, namely the Hoboken Manufacturers Railroad Company, the New Orleans & Lower Coast Railroad Company, and the Texas City Terminal Railway Company. In order to avail itself of the special cradle and crane devices by which loaded freight cars are picked up and placed on standard gauge railroad tracks laid on the decks of the vessels, this traffic, if not already in cars, has to be loaded therein to make available Seatrain's facilities.

Seatrain refers (Br. 18) to its tariffs in support of service it renders to shippers, but this point is dealt with in the report of the entire Commission (R. 29), where the Commission said:

> * * * The mere fact that it participates in such tariffs does not establish that it handled freight by means other than in railroad cars. The contrary is indicated.

Seatrain concedes (Br. 21–22) that Seatrain vessels were primarily designed for use of railroad cars, but it claims (Br. 22) that it is a serious

misstatement for the government to assert as a fact (U. S. Br. 20) that Seatrain "never carried commodities generally." A reading of the whole sentence makes it clear, it is submitted, that what was meant was that Seatrain never carried commodities generally in other than railroad cars. The table referred to (R. 265–266) in support of Seatrain's contention that it handled commodities generally does not indicate that such traffic was handled in other than railroad cars; indeed the comments at the bottom of R. 266 would strongly indicate the contrary. Those comments indicate that in a three-month period of actual operation in 1941 in the Texas City service, 2,361 loaded cars were handled, an average of 91 loaded cars per voyage (R. 266). This obviously refers to all commodities handled, except fuel oil, for which authority is given in the amended certificate.

We submit, therefore, that the record fully sustains our conclusion that, except for liquids carried in tanks, Seatrain never carried commodities generally except in loaded cars which were not unloaded during carriage by Seatrain.

II. THE INTERSTATE COMMERCE ACT AUTHORIZES THE CONDITIONS WHICH THE COMMISSION INSERTED IN THE AMENDED CERTIFICATE

Seatrain notes (Br. 25) that Section 309 (d) of Part III of the Interstate Commerce Act omits the words "service to be rendered" contained in

Section 208 (a) of Part II, and argues therefrom that the Commission is imposing service limitations, which it has no authority to do.

In the first place, what the Commission is doing here, defining the proper position that Seatrain should occupy in the field of water transportation, can hardly be termed a service limitation; on the contrary it appears to us to go to the very heart of regulation. Secondly, Congress in Section 309 (d) of Part III added to the proviso of that section, the words "or service" so that the proviso reads: "*Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, *or service* within the scope of such certificate, as the development of the business and the demands of the public shall require * * *." [Italics added.] The words "or service" do not appear in the similar proviso in Section 208 (a) of Part II. Applying the rule of *ejusdem generis* to the proviso in Section 309 (d), we submit that the right of a carrier to add to its equipment, facilities, or service within the scope of the certificate, can hardly be construed to mean that a carrier may engage in an entirely new business which it never had engaged in the past.

It should be noted, moreover, that all references at page 26 of Seatrain's brief are to be *de novo* testimony of witness Brush, not presented to the Commission, and received in the district court over our objection.

Seatrain asserts (Br. 28) that unlike the Motor Carrier Act, the Commission is given no power under the Water Carrier Act to revoke a certificate. Our position is simply what we have set out at length in our original brief (pp. 52–55), namely, that no question of revocation is here involved.

III. THE COMMISSION DID NOT CONFUSE THE TWO SEPARATE ROUTES INVOLVED IN THE PRESENT CASE

Seatrain argues (Br. 42 *et seq.*) that the Commission committed an error of law in confusing the "grandfather" application covering the New York-New Orleans operation with the extension or public convenience and necessity application covering the Texas City-New York operations. While the "grandfather" rights are covered by Section 309 (a), and the new operations by Section 309 (c), with different standards applied, the right of the Commission to issue both types of certificate is covered by one section, 309 (d). See U. S. Br. 73. When the original certificate issued by Division 4, to which rights Seatrain apparently now wants to be restored, there was no protest that the Commission had confused the issues. In fact, when the two applications were filed originally, Mr. Hodgson, an official of Seatrain, filed an affidavit with the Commission in which he stated that Seatrain's service between Texas

City and Hoboken is in practically all respects similar to its service between New Orleans and Hoboken, and the findings of the Commission as to public interest in connection with the latter are equally applicable in connection with the former (R. 288). Another official, Vice President Morse, filed an affidavit in support of the application and referred the Commission to a number of prior decisions which he asked the Commission to consider in reaching a conclusion on the application, and among those cases was the *Missouri Pacific Application Case,* 245 I. C. C. 143 (April 8, 1941) (R. 231), decided several months after the Texas City operations had commenced, wherein the Commission pointed out that Seatrain had constructed loading and unloading facilities adjacent to the tracks of the Texas City Terminal Railway Company at Texas City, similar to those at Hoboken and Belle Chasse; and that "The competitive situation resulting from Seatrain's operations between Texas City and Hoboken is, therefore, substantially the same as found in the prior report to exist in connection with Seatrain's route between Belle Chasse and Hoboken."

In the present case, both Division 4 and the full Commission discussed the New York-New Orleans and the New York-Texas City operations under separate chapters or headings (R. 54–56, first report; R. 28–31, report on reconsideration). In the last report, after such separate discussion,

there was a joint discussion as to the law to be applied and the questions presented (R. 31–38). Little would be gained by requiring the Commission to write two reports instead of one. The point has even less merit than a similar contention recently considered by this Court in *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 523, where it was found "not uncommon judicial practice to follow this course."

Seatrain (Br. 44–45) quotes from a statement made by its counsel to Commissioner Porter at the hearings in support of its claim that it objected to a combining of the two applications. It will be observed that counsel for Seatrain suggested that the two applications ought to be segregated for hearing, and the Commissioner advised "that ought to be easily handled" (R. 332–333). When the matter was called for hearing, Seatrain introduced no evidence. We have a right to assume that, if the matter had gone to hearing, the presiding Commissioner would have had his previous remarks in mind. The quotation referred to is weak foundation for any claim of error.

The alleged confusion of issues was not considered of sufficient moment to be dealt with by the court below, either in its decision (R. 119–126) or in its findings of fact and conclusions of law (R. 126–131). Appellee failed to take any cross appeal from the failure of the District Court so

to find, and of course the Commission and the Government did not assign the point as error (R. 135–138). The point has no more importance here than it was accorded by the District Court.

Respectfully submitted

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DECEMBER 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946